THE HONOURABLE SRI JUSTICE V. ESWARAIAH

WRIT PETITION Nos.356 AND 7279 OF 2007

DATED: 17-04-2007

W.P.No.356 and 7279 of 2007

BETWEEN

M/s. VMC Film Distributors,
Rep. by its Proprietor
Sri. V. Doraswamy Raju,
R/o. Flat No.16, IV Floor,
Shilpa Apartments, M.L.A. Colony,
Erramanzil, Hyderabad.

...PETITIONER

AND

The Regional Director,
Regional Office,
Employees State Insurance Corporation,
5-9-23, Hill Fort Road, A.P.,
Hyderabad and others.

...RESPONDENTS

COMMON ORDER:

Heard the learned counsel for the petitioner as well the learned standing counsel appearing for the respondents.

2. Petitioner, M/s. VMC Film Distributors, filed W.P.No.356 of 2007 to declare:

1. The notice issued by the Deputy Director, Employees' State Insurance Corporation vide proceedings Ref.No.AP/Ins.I/52-7432-101/536 dated 28.12.2006;
2. The Certificate issued by the Deputy Director, Employees' State Insurance Corporation vide proceedings Ref.No.AP/Ins.I/52-7432-101/536 dated 24.03.2006 and
3. The show cause notice dated 12.12.2006 issued by the Recovery Officer in proceedings No.52.Q/7432-101;

as illegal and arbitrary.

3. The notice dated 28.12.2005 was issued under Sections 39 and 40 of the Employees' State Insurance Act, 1948 (for short 'the Act') stating that the petitioner failed to pay the contributions in accordance with the regulations and also failed to submit the returns of the contributions from 01.11.1989 to 30.09.2005. As the petitioner failed to furnish the returns, particulars, registers, etc. in accordance with the provisions of Section 44 of the Act, it was proposed to determine and recover the amount of contributions in respect of the employees of the petitioner-establishment under Section 45-A of the Act in respect of the aforesaid period amounting to Rs.7,47,271/- and therefore, the petitioner was given an opportunity to show cause as to why the proposed assessment should not be made final and the petitioner was directed to appear before the Deputy Director on 24.01.2006 at 12 noon. However, it appears that the petitioner has not at all appeared before the concerned authority even though the said notice has been issued to the petitioner, as the petitioner himself filed the said notice dated 28.12.2005.

4. In fact, another order has been passed by the Deputy Director, ESI Regional Officer, Hyderabad under Section 45-A of the Act vide his proceedings No.AP/INS.I/52-7432-101/536 dated 10.03.2006 finally determining the quantum of contributions and directing the petitioner to pay an amount of Rs.7,47,271/- for the period from 01.11.1989 to 30.09.2005 and the petitioner was also directed to pay the said amount within 15 days from the date of receipt of the said order. Thereafter, the Deputy Director issued a recovery certificate in respect of the contributions under Section 45-A of the Act for the said amount of Rs.7,47,271/- and the interest thereon, the total of which worked out to Rs.12,59,074/-. Pursuant to that the Recovery Officer issued a show cause notice dated 12.12.2006 in proceedings 52.Q/7432-101 calling upon the petitioner to appear on 08.01.2007 at 11 AM to show cause as to why he should not be committed to civil prison. Thereafter, the

Recovery Officer vide proceedings No.52.Q/7432-101 dated 07.02.2007 passed order of attachment of movable and immovable properties and attached various movable properties under the attachment bond appended to the said notice dated 07.02.2007. The petitioner questioned the said proceedings in W.P.No.7279 of 2007.

5. Learned counsel for the petitioner submits that notice dated 28.12.2005 was issued under Sections 39 and 40 of the Act only and the respondents never determined the contribution amount under Section 44 of the Act, therefore, the question of passing orders under Section 45-A of the Act that too without giving a reasonable opportunity to the petitioner does not arise.

6. On the other hand, the learned counsel for the respondent submits that, in fact, while issuing notice under Sections 39 and 40 of the Act directing the petitioner to furnish relevant records, a date was fixed for giving reasonable opportunity to the petitioner, therefore, it is a sufficient compliance under the proviso to Section 45-A of the Act. It is further stated that the writ petition is not maintainable and the only course open to the petitioner to resolve the matter is to raise a dispute under Section 75 of the Act before the ESI court.

It is further stated that pursuant to the earlier remand orders of this Court the Inspector of the Respondent Corporation visited the establishment of the petitioner and endorsed that the attendance in wage records have been produced from 11/1994 to 01/95 but the records for the period up to 02/1997 including ledgers and the ledger books from 11/89 to 01/94 are not produced and directed the petitioner to produce the same on 04.03.1995 but no records have been produced. It is further stated that on 28.12.2005 the respondent corporation issued a show cause notice in Form C-18 informing the petitioner that he has not paid the contributions from 01.11.1989 to 30.09.2005 as per the statutory provisions envisaged under the Act and therefore, it was proposed to determine and recover the amount of

contribution payable under Section 45 of the Act. Accordingly,
15 days notice was issued to the petitioner to show cause as to why the proposed assessment should not be finalized and in fact, a date was also fixed for personal appearance of the petitioner on 24.01.2006 at 12 noon. Petitioner neither filed any document nor appeared in person explaining his case. Therefore, an order under Section 45-A of the Act has been passed on 10.03.2006 directing the petitioner to pay the amount within 15 days, failing which the recovery proceedings will be initiated under Section 45-C to 45-I of the Act. On 24.03.2006 the Authorized Officer of the respondent corporation informed the Recovery Officer in Form C-19 that since the petitioner failed to pay the amount the same may be recovered by execution proceedings. Therefore, a notice dated 22.08.2006 in Form No.ESIC-CP.26 was issued to the petitioner to show cause as to why a warrant of arrest should not be issued requiring him to appear before the concerned authority on 05.09.2006 and to show cause as to why he should not be committed to Civil Prison. The petitioner attended the personal hearing on 05.09.2006 and sought 45 days time for the settlement of the issue but he did not settle the issue within 45 days. Therefore, the respondent corporation issued another notice dated 12.12.2006 to the petitioner to show cause as to why he should not be arrested and he was directed to appear before the concerned authority on 08.01.2007 and also to show cause as to why he should not be committed to civil prison. Thus, it is evident that though reasonable opportunity has been given to the petitioner, he did not avail the same, therefore, it cannot be said he is not aware of the orders passed under Section
45-A of the Act.

7. I am of the opinion that the proviso to Section 45-A of the Act goes to indicate that a reasonable opportunity of being heard shall be given and in fact, though notice dated 28.12.2005 has been issued under Sections 39 and 40 of the Act, wherein it was indicated that the petitioner shall appear in

person and explain as to why appropriate orders shall not be passed under Section 45-A of the Act. Therefore,

it cannot be said that no reasonable opportunity to the petitioner. However, the fact remains that the petitioner failed to avail the reasonable opportunity of being heard as contemplated under Section 45-A of the Act. However, after giving notice in Form C-18 ADHOC basis about his non-contribution for the period from 01.11.1989 to 30.09.2005 payable under Section 45 of the Act, the petitioner was given another opportunity to appear in person or through an authorized representative on 24.01.2006 with necessary documents to explain his case but he failed to avail the opportunity on both occasions. Therefore, orders have been passed working out the total amount to Rs.12,59,074/- and thereafter a notice dated 22.08.2006 in Form No.ESIC-CP.26 was issued to the petitioner to show cause as to why warrant of arrest should not be issued and requiring him to appear before the concerned authority on 05.09.2006 and also to show cause as to why he should not be committed to civil prison. Pursuant to the same, the petitioner attended the personal hearing on 05.09.2006 and sought 45 days time for settlement of the issue.

As the petitioner did not settle the issue, another notice dated 12.12.2006 was issued for his appearance on 08.01.2007 but he did not comply with the same. Therefore, attachment orders dated 07.02.2007 have been issued attaching the movable and immovable properties. Questioning the said proceedings No.52.Q/7432-101 the petitioner filed W.P.No.7279 of 2007. Unless the petitioner successfully questions the orders passed under Section 45-A of the Act, he is not entitled to question the consequential orders.

8. However, as against the orders passed under Section 45 as well as 45-A of the Act and the consequential orders of attachment of movable properties, the petitioner is entitled to raise a dispute under Section 75 of the Act before the ESI Court to get settled all the disputes. In view of the remedy

available to the petitioner under Section 75 of the Act, I am of the opinion that the writ petitions filed by the petitioners are not maintainable.

Having regard to the facts and circumstances of the case,
the writ petitions are dismissed with a liberty to the petitioner to avail the remedy available under Section 75 of the Act before the ESI Court by way of raising a dispute to settle the issues, within a period of two weeks from the date of receipt of a copy of this order.
However, the attached movable property may not be sold for a period of two weeks. There shall be no order as to costs.

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V. ESWARAIAH, J

April 17, 2007
Note: Furnish C.C. of the order by 19.04.2007
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DSK